IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Notice of Motion No.3551 of 2007
in
Admiralty Suit No. 37 of 2007

Tropical Forestries Pvt.Ltd. ..Plaintiff

vs.

m.v.Pacific Novator, a foreign flag vessel ..Defendant

Mr.Vishal Sheth i/b Mr.Ruben Fernandes for plaintiff.
Mr.Prashant S.Pratap i/b Mr.Manoj Khatri for defendants.

CORAM: S.C.DHARMADHIKARI J
8th October,2007

P.C.

1. This is Defendants' Notice of Motion seeking vacating of the order of arrest dated 17th August, 2007 and for a direction to the plaintiffs to deposit in this Court or furnish security in the sum of US Dollars 3,84,800/- being the loss and damages suffered by the owners of the defendants' vessel as a result of arrest and further sums calculated from 18th September, 2007 at the rate of US Dollars 14,800/- per day.

2. Mr.Pratap appearing for the defendants in support of the notice of motion has invited my attention to the plaint and more particularly para

19 thereof.

3. His submission is that the plaintiffs have been unable to produce even at this prima facie stage any material to show that there was deterioration in the condition of cargo or logs. There is nothing on record to show that the logs were inspected and the condition of the same was one as asserted in the plaint.

4. Mr.Pratap’s grievance is that the claim is entirely speculative in as much as the vessel had arrived at Port on 1st August, 2007 without inspecting the logs and even without waiting for the logs to be discharged, the plaintiffs assumed that the logs had deteriorated in value for their alleged delay on arrival. However, when discharge commenced after 14 days the cargo was not deteriorating or as urged not in good order. He submits that there was no protest over the condition of the logs from the Receiver or from the Surveyor. The delivery was also taken unconditionally. He relies upon the surveyor’s report at Annexure 2 to the affidavit and contends that the same reinforces the submission that the logs were discharged in good condition.

5. Alternatively and without prejudice to the above, Mr.Pratap’s submission is that once the claim was lodged and plaint was affirmed in this Court, now, after the order of arrest a survey report is being placed on record. This survey report is also hopelessly vague and does not substantiate the averments in the plaint. He submits that the finding in the survey report that some logs were found to be discolourable is not acceptable. Neither any details are given with regard to the number of logs nor is there any identification made by the surveyor. In such circumstances and when the plaintiffs disposed of the cargo and it has been accepted, without any demur or protest by the buyer, then, it is inconceivable that the plaintiffs have suffered any loss.

6. Further, his grievance is that the claim is arising out of under invoicing. He submits that the logs were sold initially at US Dollars 182.00/- per CBM. The price was determined even before the logs were placed on vessel without inspecting the logs and waiting for the logs to be discharged the plaintiffs claim to have renegotiated sale at USDollars 145/- which is at the discount of 20%. This sale as renegotiated took place as on 10th

August, 2007. The Bill of Entry shows that the logs are sold to the importer at USDollars 125 per CBM. These prices are paper prices and one cannot believe that the plaintiffs would bear the loss to such an extent. The loss, without even checking and verifying the cargo which is lying in the port, is not recoverable, even prima facie.

7. He submits that the original buyer having paid the full price, had not made any claim for deterioration. Thus, there is no basis for the claim. In such circumstances, the claims are not genuine and purely speculative and should not be entertained. As far as other costs quantified at USDollars 2,50,000/- are concerned, Mr.Pratap submits that there is absolutely no basis for this claim. He invites my attention to the particulars of claim at page 44 to the plaint (Exh.Z) and submits that what are the consequential losses have not been spelt out at all. In such circumstances, the arrest has been obtained by suppressing relevant and material facts so also misleading this Court with regard to the nature of the dispute and claim. The order of arrest based upon such a case deserves to be vacated forthwith. There is no prima facie material to substantiate any of the claims.

8. Mr.Sheth on the other hand fairly states that at this stage the plaintiffs are unable to produce any material with regard to other losses quantified in the sum of USD 2,50,000/-

9. This part of the claim, therefore, need not be secured and the argument regarding the same need not detain me.

10. In so far as the differential loss between the original sale price and reduced price which was obtained on an alternative sale is concerned, Mr.Sheth states that there is enough material in the plaint itself. He submits that the plaint will have to be read as a whole and it is impermissible to pick up one part or sentence therefrom. He submits that on account of delay the original buyer protested. The said protests were notified to the owners. E-mail dated 17th July, 2007, copy of which is annexed at Annexure X would substantiate the same. He also invites my attention to renegotiated sale and contends that Exhibit Y to the plaint demonstrates that the cargo has been sold at much lesser price. He has invited my attention to the other averments in the plaint

as well. In his submission the shipment was not accepted by the original buyer. They reserved their right to claim damages and compensation as is clear from Exh.X to the plaint. Further, the logs have deteriorated on account of reasons set out in the communication at page 51. If this was not the position, there would not have been any dispute between the original buyer M.G. and the plaintiffs which required mediation and thereafter renegotiated sale. All this material coupled with the surveyor's report, now placed on record, would have to be gone into, its veracity and truthfulness has to be considered at the stage pf trial and only then a finding can be recorded about the speculative nature of claim or otherwise. He submits that this is not the stage where the merits of the controversy can be gone into in depth and length. He submits that even the defendants will have to prove the contents of their survey report. If the plaintiffs' survey report is to be discarded, that can only be done after opportunity is given to the plaintiff to substantiate their claim. In such circumstances and when the plaintiffs are giving up a part of the security without prejudice to their rights contentions at this stage, it would be just, fair and proper to reject this notice of motion.

11. Mr.Pratap in answer to these submissions once again reiterated his earlier contentions and contended that prima facie material is vague. The survey report does not specify the number of logs which have found to be deteriorated in quality with their identity. In such circumstances, it would be fair, just and proper that while insisting upon security from the defendants, the plaintiffs also should give security to this Court. The plaintiffs are foreigners and it would be impermissible for the defendants to go after the plaintiffs who are being represented by the power of attorney holder. He submits that enough material has been produced on record with regard to claim of the defendants. He invites my attention to para 9 of the affidavit in support and submits that in the affidavit in reply nothing has been stated.

12. After considering the entire material and being fully aware of the stage at which the case stands, I am of the opinion that the arguments with regard to speculative nature of the claim touch upon the merits of the controversy, which material is reliable and worthy of acceptance or not will have to be decided at a subsequent stage. It would not be proper to shut out the parties

including the plaintiffs at this stage. It is not as if that a prima facie case means a case which will necessarily succeed. It is something which requires a serious trial. The issues which have been raised must be serious enough of being considered and tried. Tests as laid down are well settled. In such circumstances, in the facts of the present case, it would not be proper, more so, when the written statement is yet to be placed on record to discard the version of the plaintiffs straightway. Oral and documentary evidence is yet to be led. The plaint averments will have to be read as a whole. So read, it is not as if there is absolutely no material on record. There are minutes which have been relied upon including the mediation meeting. Renegotiated sale agreement is also placed on record which sets out the price. As to whether the entire deal is underinvoiced or not and entered into with a view to mislead the authorities and avoid paying of customs duty is something which will have to be gone into in detail at a subsequent stage. The plaintiffs will have to be given an opportunity to substantiate their claim so also meet the case of the defendants. Further whether the delay has affected the case of the plaintiffs is a matter which must be gone into after further material is placed on record.

Admittedly, this is not a stage to go into and decide all the issues. Such being the position, I am unable to accept the submission of Mr.Pratap that the order of arrest be vacated straightway without insisting upon the defendants to furnish any security.

13. However, there is substance in the other contention of Mr.Pratap in as much as in para 9 of the affidavit in support of the notice of motion, the defendants state thus:

> "9. I say that the Defendant vessel has been under arrest from 17th August, 2007. Cargo discharge was completed on 22nd August, 2007. The Vessel has thus been under detention from 22nd August, 2007 onwards. I say that the loss sustained by the owners of the defendant vessel on account of the arrest/detention is US$12,500 per day, which would have been the charter hire that the said vessel would have earned, had the vessel been available to trade on completion of discharge. In addition, the vessel is incurring daily bunker consumption in port of 3 metric tones marine gas oil at a cost of US$ 650.00 per tonne and port

charges of US$ 350.00 per day. Thus the daily expenses incurred by the defendant on this account are US$ 1,950.00 per day. Thus, the total loss suffered by the owners of the Defendant vessel aggregates to US$ 14,800 per day. I say that the plaintiffs are required to give an undertaking in damages to compensate the owners in respect of the loss suffered on account of the order of arrest. I say that the said undertaking has been given by one Mr.Ravindra Kumbhar who claims to be the Constituted Attorney of the plaintiffs. Admittedly, the plaintiffs are not an Indian company and have no assets in India. The constituted attorney is an individual with no known means of income. In the circumstances, it is only just and necessary that the plaintiffs are directed to deposit in this Hon'ble Court a sum of US$ 14,800 per day commencing from 22nd August, 2007 when cargo discharge was completed, till the release of the vessel. The daily loss aggregates to USD 3,84,800.00 till 17th September, 2007 and continues to increase at the rate of USD 14,800.00 per day."

In reply to para 9, the affidavit dated 27th September, 2007 filed in reply to the notice of motion, by the plaintiff, states thus:

> "21.With reference to paragraph 9, it is pertinent to that the defendant vessel was under arrest since 17th August, 2007. The defendants were provided with a copy of the proceedings soon thereafter. No application, either to furnish security or to vacate the arrest was moved by the defendants for almost one month. Consequently, it is submitted that the defendants did not act prudently and are thus not entitled to now seek compensation on this account. Without prejudice to the aforesaid, soon after arrival of the defendant vessel at Kandla, repairs work was commenced on her engines. Further, it appears that repairs to the defendant vessel's engines are still underway. Thus, the defendant vessel was and still is unable to sail from Kandla. That being the position, no loss has been caused to the owners by the plaintiffs arresting the defendant vessel in as much as the defendant vessel would not have been able to sail from

Kandla, even if she was not arrested. Without prejudice to the aforesaid, it is submitted that to be entitled to seek damages, the defendants are required to make out a case of gross malice/negligence on the part of the plaintiffs. This has not been done. In any event, I deny that the owners are suffering a loss of US$ 12,500/- per day (or any part thereof) or that the said amount represents the charter hire which the defendant vessel would have earned. Pertinently, the fixture note provides that of US$ 9,000/- per day is payable and thus it is not understood as to basis on which the figure of US$ 12,500/- per day has been arrived at. It is denied that the defendant vessel is incurring the daily consumption of 3 MT (or any part thereof) of gas oil @ US$ 650 PMT. It is not admitted that the defendant vessel is incurring port charges of US$350 (or any part thereof) per day. Without prejudice to the aforesaid, it is submitted that as mentioned previously the defendant vessel is unable to sail out of port Kandla and would have, in any event, incurred the above alleged amounts/charges and suffered the above mentioned alleged

losses. Hence the said amounts cannot be claimed from the plaintiffs. It is denied that the defendant vessel/her owners are suffering a loss aggregating to US$ 14,800/- (or any part thereof) per day or that the defendants are entitled to recover such amounts from the plaintiffs. I state that it is a standard practice for an undertaking to be provided by a constituted attorney. It is denied that the defendants are entitled to an order directing the plaintiffs to deposit any amounts in this Hon'ble Court."

14. Having taken a over all view on this aspect also, in my view, it would not be fair, just and proper to direct the defendants to furnish security in the sum of US$ 5,58,000/- without any protection or safe guard. Considering the averments in para 9 of the affidavit in support of the notice of motion and apprehension of the defendants, it would be fair, just and proper to direct that upon the defendants furnishing the security in the sum of US$ 5,58,240.00 to the satisfaction of the Prothonotary and Senior Master, High Court, Bombay the plaintiff as well to secure the claim of the defendant by furnishing security in the sum of

US$.2,50,000/-

15. In the peculiar facts of this case, when the plaintiffs have been unable to substantiate their claim of other losses even prima facie and considering that the cargo is disposed of by the original buyer to a third party, the plaintiffs must undertake to secure the claim of the defendants. The delay is an additional factor so also non submission of any survey report earlier. None disputes that this course of action is permissible in law and my attention is invited to Order XXXIX Rule 7 CPC and the Original Side Rules in this behalf. However, both orders and directions are without prejudice to the rights and contentions of the parties and merely because this Court has directed that some protection be given to the defendants does not mean that the plaintiffs have to be denied the opportunity to substantiate their claim as a whole. Similarly furnishing of the security by the plaintiffs shall not be construed as an admission by the plaintiff about losses suffered by the defendants. All such aspects have to be decided uninfluenced by the order directing furnishing security by both sides.

16. In the result, notice of motion stands

disposed of in the following terms.

(i) Upon the defendants furnishing a security in the sum of US$ 5,58,240/- to the satisfaction of the Prothonotary and Senior Master of this Court, the defendants vessel would be allowed to sail without insisting upon an instrument of release but subject to the Prothonotary and Senior Master satisfying herself with regard to any pending claim or caveat against its release. Mr.Pratap on instructions states that the defendants would furnish the security in the form of bank guarantee or would secure the claim of the plaintiffs by depositing the above sum latest by Thursday the 11th October, 2007.

(ii) It is also directed that the plaintiff shall furnish the security in the sum of US$2,50,000/- to the satisfaction of the Prothonotary and Sr.Master of this Court.

(iii) Mr.Sheth states that he has no instructions to make a statement with regard to the plaintiffs furnishing the security to the sum ordered as above. In my view, security that the plaintiff would be required to furnish be also in the same form that of the defendants. That would meet the

ends of justice. The conditions to furnish security is imposed considering the fact that I have observed that the claim as made for other losses at Exh.Z is not proved at this prima facie stage to a substantial extent. In such circumstances, the plaintiffs to furnish the security latest by Monday the 15th October, 2007.

(iv) Needless to state that if the plaintiffs are unable to furnish the security by 15th October, 2007, then, this Notice of motion is made absolute
in terms of prayer clause (a) and in that event the vessel is to be allowed to sail unconditionally.

17. Mr.Pratap states that if the plaintiff is given some outerlimit to furnish the security, then, the arrest of the defendant vessel continues till that limit. In such circumstances, unless the plaintiffs furnish the security, the defendants be not called upon to furnish the security in the sum directed above. That would be for the defendant to decide. They have either options. They can first secure the claim as stated above or to wait till the plaintiff furnishes the security. In case the defendants furnishe security earlier and plaintiffs fail to furnish the same as directed, then,

Prothonotary and Senior Master to allow the defendants to withdraw the sum if deposited or take back the security furnished unconditionally.

18. Notice of Motion disposed of in the above terms with no costs.

(S.C.DHARMADHIKARI J.)